

BEFORE THE
FEDERAL MARITIME COMMISSION

ANCHOR SHIPPING CO.
Complainant

v.

ALIANCA NAVEGACÃO E
LOGISTICA LTDA.
Respondent

FMC Docket No. 02-04

ALIANCA NAVEGACÃO E LOGISTICA LTDA.
ANSWER TO AMENDED COMPLAINT

Comes now Respondent Alianca Navegação E Logistica Ltda & Cia. ("Alianca" or "Respondent") and in answering the allegations of the Amended Complaint by Anchor Shipping Co. ("Anchor" or "Complainant") using the paragraphs as numbered by Complainant admits, denies, or alleges as follows:

I. Respondent is without knowledge sufficient to form a belief as to the validity of the statements contained in Paragraph I and therefore denies each and every allegation contained therein. .

II. (a) Respondent admits it is an ocean common carrier and denies each and every other allegation in the first paragraph of Section II of the Complaint.

(b) Respondent denies each and every allegation in the second paragraph of Section II of the Complaint,

(c) Respondent denies each and every allegation in the third paragraph of Section II of the Complaint,

(d) Respondent denies each and every allegation in the fourth paragraph of Section II of the Complaint,

III. Complainant's statements in Paragraph III are a series of requests to the Federal Maritime Commission which are not statements of fact. Respondent denies that any of these requests are proper under the facts and denies each and every allegation contained in these statements.

IV A. Respondent admits it changed the number of a service contract from 99-165 to 99-0511 to correspond with the numbering system used by Respondent for service contracts originating in Miami. Respondent further admits that the service contract was not

changed in any other respect other than to extend it to May 6, 2000 to give Complainant more time to meet its minimum MQC. Except as stated, Respondent denies each and every other allegation contained in Paragraph IV A.

B. Respondent lacks information sufficient to form a belief as to the facts alleged, and on that basis, Respondent denies each and every allegation contained in Paragraph IV B.

C. Respondent denies each and every allegation contained in Paragraph IV Section C.

D. Respondent denies each and every allegation contained in Paragraph IV Section D.

E. Respondent denies each and every allegation contained in Paragraph IV Section E.

F. Respondent denies each and every allegation contained in Paragraph IV Section F and affirmatively avers that certain shipments tendered by Complainant as shipments to be covered by the terms and conditions of service contract 99-0511 were not within the scope of service contract 99-0511 and carriage of such commodities under that service contract would have been a violation of the Shipping Act of 1984, as amended. Respondent further avers that Complainant acknowledged at the time that such shipments were not covered by service contract 99-0511. Except as so stated, Respondent denies each and every allegation contained in Paragraph IV Section F.

G. Respondent denies each and every allegation contained in Paragraph IV Section G.

H. Respondent denies each and every allegation contained in Paragraph IV Section H.

I. Respondent denies each and every allegation contained in Paragraph IV Section I.

J. Respondent admits that a business luncheon was held with representatives of Complainant and Columbus Line but in all other respects denies each and every allegation contained in Paragraph IV Section J.

K. Respondent denies each and every allegation contained in Paragraph IV Section K.

L. Respondent denies each and every allegation contained in Paragraph IV Section L.

M. Respondent denies each and every allegation contained in Paragraph IV Section M.

N. Respondent denies each and every allegation contained in Paragraph IV Section N.

O. Respondent denies each and every allegation contained in Paragraph IV Section O.

P. Respondent admits that it suspended its West Coast South America service, but avers that it provided alternative service for Complainant through use of space chartered from Columbus Line in order to honor its service contract commitments. Respondent admits further that Columbus Line acted on Alianca's behalf and issued one bill of lading to

Complainant under the service contract between Complainant and Respondent.
Respondent denies each and every allegation not consistent with the above admission.

Q. Respondent denies each and every allegation contained in Paragraph IV Section Q.

R. Respondent denies each and every allegation contained in Paragraph IV Section R.

S. Respondent denies each and every allegation contained in Paragraph IV Section S.

T. Respondent denies each and every allegation contained in Paragraph IV Section T.

U. Respondent denies each and every allegation contained in Paragraph IV Section V.

V. Respondent denies each and every allegation contained in Paragraph V.

A. Respondent denies each and every allegation contained in Paragraph V Section A.

B. Respondent denies each and every allegation contained in Paragraph V Section B.

C. Respondent denies each and every allegation contained in Paragraph V Section C.

D. Respondent denies each and every allegation contained in Paragraph V Section D.

E. Respondent denies each and every allegation contained in Paragraph V Section E.

F. Respondent denies each and every allegation contained in Paragraph V Section F.

G. Respondent denies each and every allegation contained in Paragraph V. Section G.

H. Respondent denies each and every allegation contained in Paragraph V. Section H.

I. To the extent Respondent understands the allegations contained in Paragraph V. Section I, Respondent denies the allegations. As to the other allegations. Respondent lacks information sufficient to form a belief as to the facts alleged, and on that basis, Respondent denies them.

J. Respondent denies each and every allegation contained in Paragraph V. Section J.

K. Respondent admits that it filed a collection action to obtain payment for unpaid freight on shipments not made under the three service contracts between Complainant and Respondent, only one contract of which also was before the arbitrator, and otherwise denies each and every allegation contained in Paragraph V. Section H.

L. Paragraph V Section L is a request for relief to the FMC and each and every allegation contained therein is denied in all respects by Respondent.

VI. Except for the fact that Complainant received unwarranted reparations in an arbitration, Respondent denies each and every allegation contained in Paragraph VI either because they are untrue or because Respondent lacks information sufficient to form a belief as to the facts alleged. Respondent's denial is based in part on the fact that the arbitrator's decision was contrary to the Shipping Act of 1984, as amended, contrary to the clear language of the Shipping Act, the FMC regulations, the FMC case law, and the opinion of the FMC General Counsel submitted in the arbitration.

VII. Respondent denies each and every allegation and request for relief contained in Paragraph VII.

AFFIRMATIVE DEFENSES

Respondent hereby asserts the following Affirmative Defenses in this proceeding:

I. Complaint fails to state claims against Respondent on which relief can be granted.

II. Complaint has failed to join indispensable parties.

III. Complainant claims are barred by its failure to mitigate alleged damages.

IV. Complainant engaged in numerous violations of the Shipping Act of 1984, as demanded and has unclean hands which bars the granting of the requested relief herein.

V. Complainant's action is barred by Estoppel, as Complainant knew that service contract 99-0511 could not be expired?, knew that certain cargo tendered was outside the commodity descriptions and geographic scope of service contract 99-0511, knew that there was a maximum of five TEUs allowed per sailing, knew that it did not have enough cargo to ship to fulfill its MQCs with Respondent, and knew that the rates in the Respondent service contract 99-0511 were no better than and in some instances higher than the rates offered by other carriers.

VI. Respondent is owed freight monies for failure of Complainant to meet service contract minimums and for making shipments under service contract rates which were not covered under those service contracts but must instead be rated at tariff rates, and Respondent has the right to offset any amount of alleged damages said to be suffered by Complainant. Respondent's attempt to ship under the contract commodities not covered thereby constituted violations of Section 10(a)(1) of the shipping Act of 1984, as amended.

VII. Respondent had no obligation to perform under its service contracts with Complainant until Complainant had cargo to book under those contracts, and actually

made or attempted to make bookings in accordance with the terms of the service contracts.

VIII. Respondent may enter into discussions and agreements with affiliates who are wholly-owned by a common parent without filing an agreement with the FMC as such discussions and agreements are exempt from filing under FMC regulations.

IX. Complainant's conduct violates the Shipping Act of 1984 as amended, the FMC regulations and the FMC decisions.

X. Complainant's claims are contrary to the Shipping Act of 1984, as amended and the FMC's regulations and decisions.

XI. The Commission's reversal of Judge Kline's Order dismissing the complaint is erroneous.

COUNTER-COMPLAINT

Alianca, pursuant to section 502.64 of the Commission's regulations, for its counter-complaint, states as follows;

PARTIES

1. Counter-Complainant, Alianca Navegacao E Logistica Ltda & Cia. ("Alianca" or "Counter-Complainant"), is a corporation organized and existing under the laws of Brazil, with its main office located at Rua Verbo Divino, 1547, Bairro Chacara Santo Antônio, 04719-002 São Paulo SP, Brazil. At all times relevant to this Counter-Complaint Alianca was and is an ocean common carrier in the United States foreign commerce under the Shipping Act of 1984, as amended ("Act").
2. Counter-Respondent, Anchor Shipping Company ("Anchor" or "Counter-Respondent"), believed to be a corporation organized and existing under the laws of Florida, is located at 1031 Ives Dairy Road, Suite 228, North Miami Beach, FL 33179. At all times relevant to this Complaint, Anchor was a non-vessel operating common carrier ("NVOCC") with its principal place of business in Florida.

JURISDICTION

3. This case arises under section 10 of the Act, 46 App. U.S.C. 1709, as more particularly set forth below, and may also invoke section 13 of the Act, 46 App. U.S.C. 1712. The Federal Maritime Commission ("FMC")

has jurisdiction over this Complaint under section 11 of the Act, 46 App. U.S.C. 1710.

HISTORY OF THIS CONTROVERSY

4. Alianca and Anchor entered into Service Contract No. EC 99-0511 ("Service Contract 511"), effective May 6, 1999 through April 30, 2000 as fully described in Attachment A, as filed with the FMC.
5. Service Contract 511 was amended and the amendment filed with the FMC, as shown in the attached copy of the amendment (Attachment B), to extend the period of the contract to May 6, 2000 and for other purposes.
6. Service Contract 511 also was amended a second time, as shown in the attached written copy of the amendment (Attachment C). This writing was not filed with the FMC. Neither Alianca nor Anchor contest the validity of this amendment.
7. Service Contract 511 incorporated within its terms Alianca's Essential Terms Publication Rules which contained as Rule 101 an arbitration clause pursuant to which disputes between the parties were to be presented to a sole arbitrator, a member of the Society of Maritime Arbitrators, Inc. in New York. In December, 1999, Anchor filed a Notice of Arbitration and named an arbitrator. Alianca objected to the Anchor arbitrator and named an alternative arbitrator. This was unacceptable to Anchor and in accordance with the arbitration provision applicable to Service Contract 511, Anchor requested the President of the Society of Maritime Arbitrators to appoint an arbitrator. The President appointed herself.
8. The arbitration provision specifically stated that "Service contracts shall be construed and governed by the Shipping Act of 1984, as amended, and regulations issued by the Federal Maritime Commission pursuant thereto. To the extent issues of construction relate to matters of contract or other law, the law of the State of New York shall be the applicable law."

THE ARBITRATOR'S DECISION AND AWARD

9. On July 31, 2001 the Arbitrator issues a Decision and Award, Attachment D. ("Arbitration Decision").
10. The Arbitration Decision found and concluded that there were oral amendments to the Service Contract 511 that the Arbitrator deemed effective, notwithstanding that such alleged amendments were not agreed to by Alianca, were not in writing, were not signed by the parties, and were never filed with the FMC. Among the alleged oral amendments were (a) the alleged merging of Service Contract 511 with two other service contracts between Anchor and Alianca, Service Contract Nos. 99-002 and 99-003, each with different terms and conditions, different time periods, and different geographic scopes; (b) the addition of commodities to the list of commodities covered by Service Contract 511; and (c) the addition of a requirement in Service Contract 511 that would allow Anchor to ship under the Contract out-of-gauge and other cargo which substantially exceeded 5 TEUs, despite the language of the Contract restricting Anchor to 5 TEUs per sailing provided shipments were booked in a timely manner as provided by the Contract.
11. Notwithstanding the FMC's primary, if not exclusive jurisdiction to determine whether the Act has been violated, the Arbitration Decision found that Alianca violated certain provisions of the Act and the FMC regulations. Having improperly determined there were oral amendments, the Arbitrator also found that Alianca violated "Section 8(c))(2) and (6) (sic)" for "failure to correct the Master Contract or to file [such] amendment or correction to that Contract." In addition, based on the determination that there were oral amendments to Service Contract 511 that Alianca failed to file, the Arbitration Decision then finds Alianca allegedly implemented such amendments in violation of Section 10(b)(2)(A) of the Act and 46 CFR Section 530.8(a) of the Commission's regulations. Third, the Arbitration Decision found that Alianca's alleged actions were allegedly a result of Anchor's failure to agree to increase rates for part of Service Contract 511, and amount to bad faith, coercion and retaliation by Alianca, in violation of sections 10(b)(3) and 10(b)(10) of the Act.
12. The Arbitration Decision allowed Anchor to count under Service Contract 511 shipments in which Anchor acted "as agent" for other shippers and was not itself the shipper.
13. The Arbitration Decision erroneously permitted Anchor to be

relieved of its obligation to pay for ocean transportation services provided by Alianca and/or reduces payment for services performed by Alianca.

14. The Arbitration Decision set off freight earned by Alianca and not paid by Anchor, against an alleged \$1,000 waiver of a freight charge because Alianca allegedly sent an Anchor shipment to the wrong destination, although Alianca then carried it to the correct destination.
15. The Arbitration Decision found that Anchor's self-described "time-volume contracts" prove the existence of cargo which allegedly could have been shipped under Service Contract 511. The Arbitrator specifically found that these "time-volume contracts" of Anchor, an NVOCC, are not unlawful under the Act even though NVOCCs did not have the right at the time to enter into contracts with their shippers.
16. The Arbitration Decision allowed cargo to count toward Anchor's minimum volume commitment under Service Contract 511, regardless of Anchor's failure to book the cargo with Alianca, one of the basic prerequisite of the Contract.
17. The Arbitration Decision deliberately misapplied the arbitration provision by failing to apply or adhere to the provisions of the Act, which is to construe and govern Service Contract 511, in favor of New York law, which under the arbitration clause is only to be applied if there is a need for contract construction.
18. The Arbitration Decision set off against Anchor's claims freight payments due Alianca for shipments made by Anchor and which payments Anchor does not dispute are due Alianca.
19. The Arbitration Decision agreed to compensate Anchor for alleged "poor service" by Alianca, contrary to the Act and in the absence of any provision in the Service Contract 511 for compensation of Anchor should there be poor service.
20. The Arbitration Decision placed the burden on Alianca to inform Anchor of when a contract and amendments, and their contents, are filed with the Commission, with knowledge that the FMC case law says that while the carrier is responsible for filing contracts and amendments thereto, the shipper is responsible for knowing when and what is filed. The Arbitration Decision termed the FMC decision and system making the shipper responsible to be knowledgeable "flawed", putting shippers at a "serious disadvantage", and finds Alianca in violation of the Act and FMC

regulations for not adhering to the Arbitrator's view of what should be the law.

VIOLATIONS OF THE SHIPPING ACT OF 1984, AS AMENDED

21. Anchor has implemented the decision and award by asserting that the decision of the Arbitrator that there was an oral agreement to merge Service Contracts -002 and -003 with Service Contract 511 is grounds for dismissal of separate arbitration proceedings before a different arbitrator for liquidated damages due Alianca as a result of Anchor's failure to meet the MQC in each of those contracts. See Attachment E. This effort and other anticipated efforts by Anchor to implement and enforce the decision and award of the Arbitrator with respect to alleged oral agreements violate Sections 3(19) and 8(c) of the Act and constitute a knowing and willful act to thwart the collection of the proper service contract rates in violation of section 10(a)(1).
22. Anchor's efforts to implement and enforce the decision and award of the Arbitrator with respect to the alleged oral agreements, with the knowledge that there were no agreements by Alianca, no writing, no signatures, and no filing with the FMC, and with the further knowledge of the statutory and regulatory prohibitions on oral modifications to service contracts, as further made clear in an informal opinion of the then FMC General Counsel provided to Anchor and the Arbitrator, is a deliberate attempt by Anchor to avoid the liquidated damages provisions of Service Contract 511, and constitutes a bad faith effort to obtain transportation for property at less than the properly applicable rates by an unjust and unfair device or means, in violation of section 10(a)(1) of the Act and is an unreasonable practice under section 10(d)(1).
23. The efforts of Anchor to implement and enforce the Arbitration Decision based on the alleged violations of the Act by Alianca are efforts to usurp the FMC's primary and exclusive jurisdiction to find violations of the Act. Anchor's attempts to obtain an award on these bases and the implementation of the award by Anchor are violations of sections 10(a)(1) and 10(d)(1) of the Act.
24. The efforts of Anchor to implement and enforce the Arbitration based on the alleged violations of the Act by Alianca are efforts to usurp the FMC's primary and exclusive jurisdiction to find violations of the Act. Anchor's attempts to obtain an award on these bases and the implementation

of the award by Anchor are violations of sections 10(a)(1) and 10(d)(1) of the Act.

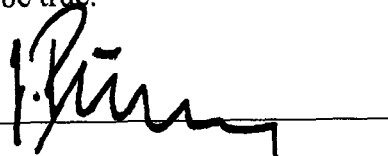
25. The efforts of Anchor to implement and enforce the Arbitration Decision counting under Service Contract 511 shipments for which Anchor is only acting as agent and is not the shipper entitled to service contract rates, is a violation of section 10(a)(1) of the Act.
26. The efforts of Anchor to implement and enforce the Arbitration Decision by counting as shipments under Service Contract 511 commodities and levels of shipments specifically excluded by the Contract, is a violation of section 10(a)(1) .
27. The efforts of Anchor to implement and enforce the Arbitration Decision that Anchor's time-volume contracts are not unlawful under the Act and should be counted toward Anchor's minimum volume commitment and damages claim, would permit Anchor to redefine what is a service contract, in violation of sections 10(a)(1) and 10(d)(1), and allow Anchor to benefit from its unlawful conduct.
28. The efforts of Anchor to implement and enforce the Arbitration Decision applying New York law instead of the Act, is a violation of section 8(c) of the Act.
29. The efforts of Anchor to implement and enforce the Arbitration Decision overturning the FMC's decision on the responsibility a shipper has to know what is in its service contracts filed with the FMC, and to find Alianca in violation of the Act for not adhering to the Arbitrator's decision, is a violation of section 10(d)(1) of the Act.
30. All of Anchor's efforts to implement and enforce the Arbitration Decision as stated in this Complaint, constitute violations of Section 13(a) of the Act for which civil penalties should be assessed.

REPARATIONS

31. If, notwithstanding this Counter-Complaint, the Arbitration Decision and Award continues to be enforced which Arbitration Decision required Alianca to pay Anchor \$381,880.59 plus interest, then Alianca should be awarded such amount as reparations hereunder to

VERIFICATION

I, Juergen Pump, state that I have read the foregoing Answer to Amended Complaint and that the facts stated therein, upon information known and received from others, affiant believes to be true.



Subscribed and sworn to before me, a notary public in and for the State of New Jersey, County of Union, this 10th day of July 2006.

[Seal]

(Notary Public)



DENISE A. ABREU
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 12/15/2008

Certificate of Service

The undersigned hereby certifies that he has this 11th day of July, 2006 served the foregoing document on Anchor Shipping Co. and Jorge Espinosa, Esq. by first class mail, postage prepaid.

Paul D. Coleman
Paul D. Coleman